APPEAL NO. 010514

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 14, 2001. With regard to the disputed issues the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on September 28, 1999, with a 14% impairment rating (IR) and that the claimant is not entitled to an extension of the statutory MMI date pursuant to Section 408.104. The claimant appeals arguing that the hearing officer erred in his determination that the designated doctor's withdrawal of his prior MMI date and IR was not valid and in finding that the claimant was not entitled to an extension of the MMI date due to his spinal surgery. The respondent (carrier) responded.

DECISION

Affirmed.

On _____, the claimant was performing his job duties as a truck driver when he was involved in a collision. The claimant testified that the carrier requested that he be seen by Dr. GD, who certified him at MMI on July 19, 1999, and assigned an IR of 9%. The claimant also testified that he disputed that finding and requested a designated doctor be appointed. On October 4, 1999, the designated doctor, Dr. T, a chiropractor, certified that the claimant had reached MMI on September 28, 1999, and assigned an IR of 14%. The claimant also testified that he saw Dr. W, who requested a myelogram, in July of 1999. The carrier refused to preapprove the myelogram, so the issue went through the dispute resolution process whereby the carrier was ordered to pay for the procedure, which was performed in January 2000.

The claimant further testified that he was referred to Dr. C, who recommended surgery in February 2000 and requested a discogram. Again, the carrier refused to preapprove the procedure and the issue went to dispute resolution where the carrier was once again ordered to pay for the procedure, which was performed on July 10, 2000. In July 2000, Dr. W recommended surgery and the carrier requested a second opinion from a doctor who recommended more therapy. A third opinion was sought from Dr. D, who concurred that surgery is needed. Spinal surgery was approved on October 17, 2000, and performed on November 28, 2000.

The claimant also offered evidence that on October 30, 2000, the Texas Worker's Compensation Commission (Commission) issued a request for clarification from the designated doctor concerning his MMI date. On November 3, 2000, Dr. T, the designated doctor, amended his report to state "After reviewing new information regarding [claimant's] current condition, it is my professional opinion that he has not reached MMI."

The hearing officer determined that "[Dr.T's] purported retraction of his October 4, 1999 certification of [MMI] and IR was not made within a reasonable time and for a proper

purpose." The claimant appeals the hearing officer's decision, claiming that he erred because he "used the wrong standard to base his decision and considered the issue of waiver, which was not before him."

The 1989 Act provides that the designated doctor's report is to be given "presumptive weight, and the commission shall base its determination of whether the employee has reached MMI on the report unless the great weight of the other medical evidence is to the contrary." Sections 408.122(c) and 408.125(e). Where surgery is under active consideration before statutory MMI, the hearing officer should consider whether the designated doctor amended his report for a proper reason and within a reasonable amount of time. Texas Workers' Compensation Commission Appeal No. 002929-S, decided January 23, 2001.

Whether a doctor has amended his report for a proper reason and within a reasonable amount of time is essentially a question of fact. Texas Workers' Compensation Commission Appeal No. 960888, decided June 18, 1996. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We do not conclude that the hearing officer improperly applied the law to the facts. His factual determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The claimant also appeals the hearing officer's determination that the claimant is not entitled to an extension of the statutory MMI for spinal surgery. The applicable statutory provision is Section 408.104, which applies to claims for injuries that occur on or after January 1, 1998. It provides, in pertinent part:

> (a) On application by either the employee or the insurance carrier, the commission by order may extend the 104-week period described by Section 401.011(30)(B) if the employee has had spinal surgery, or has been approved for spinal surgery under Section 408.026 and commission rules, within 12 weeks before the expiration of the 104-week period. If an order is issued under this section, the order shall extend the statutory period for [MMI] to a date certain, based on medical evidence presented to the commission.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.11(a) (Rule 126.11(a)) further provides, in pertinent part, that "[a]pproval for spinal surgery is either the notification from the spinal surgery section of the Commission or a decision from the appeals process finding the insurance carrier liable for the reasonable costs of the surgery." The claimant asserts that "it is not the fault of [claimant] nor his doctors that spinal surgery was not approved prior to statutory MMI." The claimant points to the many delays caused by the carrier. We have

previously decided that there is no good cause exception to Section 408.104 or Rule 126.11. *See* Texas Workers' Compensation Commission Appeal No. 002749-S, decided January 10, 2001.

Accordingly, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge